No. 78-1267

In the Supreme Court of the United States

OCTOBER TERM, 1978

BILLY D. HICKS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is reported at 587 F. 2d 252.

JURISDICTION

The judgment of the court of appeals was entered on January 8, 1979. The judgment was vacated and reentered on January 15, 1979. The petition for a writ of certiorari was filed on February 14, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the definition of "adulterated food" contained in Section 402 of the Federal Food, Drug and Cosmetic Act is vague and indefinite in violation of the Due Process Clause of the Fifth Amendment.

2. Whether the jury's determination that petitioner had sold adulterated food in violation of the Federal Food, Drug and Cosmetic Act constituted an impermissible ex post facto application of the law.

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Mississippi, petitioner was convicted on six counts of introducing and conspiring to introduce adulterated food in interstate commerce, in violation of the Federal Food, Drug and Cosmetic Act, 21 U.S.C. 331(a), 342(a)(1), 342(a)(C), and 348, and 18 U.S.C. 371.[1] He was sentenced to three years' imprisonment on one count, with eligibility for parole after nine months, and to a fine of $1,000 and three years' probation on each remaining count. The court of appeals affirmed (Pet. App. 1a-16a).

The evidence at trial showed that petitioner purchased poison-treated cottonseed, intended for farm planting, which was contained in bags marked "Poison-treated—Do not use for food, feed, or oil" (Pet. App. 4a). He and his co-defendants caused the seed to be processed into meal through a local mill (*ibid.*). The mill's invoices to petitioner bore the warning "Fertilizer, chemical or industrial use only" (*id.* at 5a). Petitioner also received a certified letter from the mill containing the same warning (*ibid.*).

Notwithstanding the clear warnings contained on the seed bags, the invoices, and the letter from the mill, petitioner and his co-defendants sold the meal to

[1]Section 402(a) of the Act, 21 U.S.C. 342(a), defines adulterated food as food that contains "any poisonous or deleterious substance which may render it injurious to health." That section also provides that a food is adulterated if it contains "any food additive which is unsafe," as defined in 21 U.S.C. 348. The Act's prohibition against sale of adulterated food in interstate commerce extends to animal feed. 21 U.S.C. 321(f).

Southern Feed Ingredients Company, a company that dealt solely in animal feed (Pet. App. 5a). Petitioner's co-defendants assured Southern Feed that the warnings on the bills of lading were erroneous and that the meal could be used for animal feed (*ibid.*). Subsequently, customers who purchased the meal from Southern Feed complained that it was tainted. Tests conducted by the Food and Drug Administration confirmed that the meal contained poisonous chemicals: mercury, a fungicide (PCNB), and an insecticide (Disyston) (*id.* at 6a).

ARGUMENT

The decision of the court of appeals, on which we generally rely, is correct and does not conflict with any decision of this Court or any other court of appeals. Review by this Court is unwarranted.

1. Petitioner contends (Pet. 5-8) that Section 402(a) of the Federal Food, Drug and Cosmetic Act, 21 U.S.C. 342(a), is unconstitutionally vague because it fails "to place one on notice of what may be injurious to health or what does ordinarily cause a food to be adulterated" (Pet. 5).

A statute is not unconstitutionally vague, however, unless it fails to convey fair notice to a person of ordinary intelligence that his contemplated conduct is forbidden. See, *e.g.*, *United States* v. *Harriss*, 347 U.S. 612, 617 (1954). If the general class of proscribed offenses is plainly within its terms, a statute does not offend the Due Process Clause simply because there may be difficulty in determining whether certain marginal cases are subject to its prohibition. *Id.* at 618. See also *United States* v. *National Dairy Products Corp.*, 372 U.S. 29, 32-33 (1963); *Boyce Motor Lines, Inc.* v. *United States*, 342 U.S. 337, 340 (1952). Absent a First Amendment question, "vagueness challenges to statutes * * * must be examined in the light of the facts of the case at hand." *United States* v. *Mazurie*, 419 U.S. 544, 550 (1975).

The Federal Food, Drug and Cosmetic Act states in unmistakable terms that food is adulterated if "it bears or contains any poisonous or deleterious substance which may render it injurious to health * * *" (21 U.S.C. 342(a)(1)) or if it contains "any food additive which is unsafe" as defined by statute (21 U.S.C. 342(a)(2)(C)). As this Court noted in *United States* v. *Lexington Mill Co.*, 232 U.S. 399, 411 (1914), Congress clearly expressed its purpose broadly to condemn the sale of adulterated food substances under the Act. See also *United States* v. *Thriftimart, Inc.*, 429 F. 2d 1006, 1011 (9th Cir. 1970); *Golden Grain Macaroni Co.*, v. *United States*, 209 F. 2d 166, 167-168 (9th Cir. 1953), and *Berger* v. *United States*, 200 F. 2d 818, 820-822 (8th Cir. 1952), all rejecting contentions that the definitions of "adulterated food" contained in the Act are unconstitutionally vague. The statute gave petitioner fair warning that he could not sell seed designated as "poison-treated" for use as food.[2]

2. Petitioner also argues (Pet. 9-10) that, because the jury was required to determine whether the feed that he sold was adulterated, the Act was applied ex post facto.[3] However, a law violates the Ex Post Facto Clause only if it punishes acts that were innocent when done, imposes additional punishment retroactively, or deprives the accused of a defense that existed when his acts occurred. See, *e.g.*, *Dobbert* v. *Florida*, 432 U.S. 282, 292 (1977). Here, of course, the Federal Food, Drug and Cosmetic Act existed long before petitioner sold adulterated feed; no additional penalties were imposed upon him; and no

[2]Contrary to petitioner's assertion (Pet. 7), the government was not required to prove that he had specific intent to violate the statute. See *United States* v. *Park*, 421 U.S. 658, 670-673 (1975); *United States* v. *Dotterweich*, 320 U.S. 277, 284-285 (1943).

[3]Article 1, §10 of the Constitution prohibits a state from passing any "ex post facto law." The Due Process Clause imposes similar restrictions on the federal government.

defenses were taken from him. See *Dean Rubber Manufacturing Co.* v. *United States*, 356 F. 2d 161, 165 (8th Cir. 1966). Petitioner has no colorable claim that his conduct was outside the scope of the Federal Food, Drug and Cosmetic Act. It was the very conduct that the Act was intended to proscribe. *United States* v. *Park, supra*, 421 U.S. at 671-672.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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